IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

DAYTON RUBBER COMPANY, *Petitioner*

v.

CORDOVAN ASSOCIATES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP C. EBELING
PICKREL, SCHAEFFER AND EBELING
Third National Bank Building
Dayton, Ohio

and

JAMES E. CORKEY
Shoreham Building
Washington, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Rule involved	3
Statement	3
Reasons for granting the writ	8
Conclusion	16

Appendix A	1a
Appendix B	12a
Appendix C	13a
Appendix D	17a

CITATIONS

CASES:

Bishop v. *United States*, 223 F. 2d 582, 350 U.S. 961 9
Central Ry. Signal Co. v. *Longden*, 194 F. 2d 310 ...9, 10
Chicago, Burlington & Quincy R. Co. v. *United States*, 221 F. 2d 811 9
Coleman v. *Sears, Roebuck & Co.*, 238 F. 2d 206 9
C.I.R. v. *Consolidated Premium Iron Ores, Limited*, 265 F. 2d 320 .....10, 11
Commissioner v. *Duberstein*, — U.S. — (decided June 13, 1960) 11, 12, 15
Dixie Sand & Gravel Corporation v. *Holland*, 255 F. 2d 304 11
Graver Tank Co. v. *Linde Air Products Co.*, 339 U.S. 605 .....11, 15
Gudgel v. *C.I.R.*, 273 F. 2d 206 11
Hycon Manufacturing Co. v. *H. Koch & Sons*, 219 F. 2d 353 9
Kaye v. *Smitherman*, 225 F. 2d 583 9

Page

Kraft Foods Company v. *C.I.R.*, 232 F. 2d 118 9
Letcher County v. *DeFoe*, 151 F. 2d 987 11
McAllister v. *United States*, 348 U.S. 19 .....10, 11
Rich v. *Pappas*, 229 F. 2d 308 11
Seagrave Corp. v. *Mount*, 212 F. 2d 389 .....9, 11
E. H. Sheldon and Co. v. *C.I.R.*, 214 F. 2d 655 11
Stevenot v. *Norberg*, 210 F. 2d 615 9
Texas Co. v. *R. O'Brien Co.*, 242 F. 2d 526 9
United States v. *Allinger*, 275 F. 2d 421 11
United States v. *One 1950 Buick Sedan*, 231 F. 2d 219 9
United States v. *United States Gypsum Co.*, 333 U.S. 364 .....9, 10, 11, 12, 15
Willett v. *C.I.R.*, 277 F. 2d 586 11
Wise v. *C.I.R.*, 260 F. 2d 354 10
Wright v. *C.I.R.*, 274 F. 2d 883 10
Yunker v. *C.I.R.*, 256 F. 2d 130 .....10, 11

RULE:

Rule 52, Federal Rules of Civil Procedure (28 U.S. C.A.) 2, 3, 7, 8, 10, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

DAYTON RUBBER COMPANY, *Petitioner*

v.

CORDOVAN ASSOCIATES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The Dayton Rubber Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on June 6, 1960.

OPINION BELOW

The District Court did not render an opinion. Its findings and conclusions were entered on May 6, 1959 (Appendix A, *infra*, pp. 1a-11a) and its order of declaratory judgment was filed June 8, 1959 (Appendix, B, *infra*, p. 12a). The opinion of the Circuit Court of Appeals (Appendix C, *infra*, pp. 13a-17a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1960 (Appendix D, *infra*, p. 17a). A timely petition for a rehearing was denied on July 6, 1960. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

This was an action for a declaratory judgment instituted by the Dayton Rubber Company against Cordovan Associates, Incorporated, to resolve the question of whether or not Dayton, by reason of its contract with Cordovan, was required to accord to approved distributors of Cordovan, for the period from June 1, 1958 to the termination of the contract on October 31, 1958, the same prices that it accorded to its other chain store customer, White Stores, Inc. After a non-jury trial of two weeks duration, the trial judge held that Dayton was not so required. In the course of detailed findings, the trial judge found that:

> There was no provision, either oral or written, nor were there facts from which [illegible]erence could be drawn, that Cordovan prices were to be tied to White prices under all circumstances.

The Court of Appeals reversed the judgment of the trial court because it disagreed with that finding. It held that this was an inference or conclusion drawn from the facts with which it was free to disagree uninhibited by the clearly erroneous test of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., following 723(c).

The sole question is whether the Court of Appeals erred in failing to apply to the finding above mentioned the clearly erroneous test of Rule 52.

RULE INVOLVED

Rule 52 of the Federal Rules of Civil Procedure [28 U.S.C.A.] provides in part as follows:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT

The Dayton Rubber Company, petitioner herein is an Ohio corporation. It is a manufacturer, among other things, of automobile tires and tubes. On November 1, 1956, it entered into a contract with Cordovan Associates, Incorporated, a Virginia corporation, under which it agreed to manufacture and sell to customers approved by Cordovan Associates tires and tubes bearing the brand name Cordovan. Cordovan's approved customers were chain store operators of automotive retail businesses located throughout a large area of the United States. The contract was for a term of two years (November 1, 1956, to October 31, 1958), and required that Dayton sell Cordovan brand tires and tubes to the approved distributors at prices "prevailing on date of shipment." Sales were made to the various Cordovan distributors until the termination of the contract on

October 31, 1958. However, a dispute arose as to the prices Dayton could properly charge the various distributors for the items sold to them during the period from June 1, 1958 to October 31, 1958. Cordovan contended that the phrase "prices prevailing on date of shipment" entitled its distributors to the same prices Dayton charged its other chain store customer White Stores, Inc. Dayton contended that "prices prevailing on date of shipment" referenced a pricing formula and that it was free to enter into a new contract with White Stores without being under obligation to enter into a similar contract with Cordovan. Since there were numerous Cordovan distributors located in several different jurisdictions who owed Dayton large sums for tires and tubes sold to them during the period in question, Dayton, to avoid a multiplicity of suits, brought an action for a declaratory judgment to obtain a construction of the contract and a decision as to the rights and obligations of the parties under it.

After a non-jury trial of two weeks' duration, the trial judge made detailed findings of fact and entered judgment in favor of Dayton concluding that the prices charged Cordovan distributors by the rubber company were proper and in accordance with the contract between Dayton and Cordovan.

In brief, the trial judge found that from 1947 to 1956, the Dayton Rubber Company had sold tire casings and tubes through its chain store division to both White Stores, Inc., and the approved distributors of Cordovan Associates billing them on an identical "cost justification basis," though it had no written contract with either customer (Apdx. 3a). Fluctuations in prices, which generally came about quarterly,

were applied uniformly and identically to shipments going to both customers (Apdx. 3a).

In 1956, Dayton entered into a written contract with White Stores, Inc., for the sale of such tires and tubes. This contract was for a term of three years, commencing August 1, 1956 (Apdx. 4a). Thereafter, on November 1, 1956, it entered into a similar contract with Cordovan Associates for a term of two years (Apdx. 4a). The contract with Cordovan contained the following paragraph with regard to prices for tires and tubes purchased pursuant to such contract:

> 5. Price. Supplier will invoice buyer's associates and approved distributors for Cordovan brand casings and tubes purchased hereunder at prices prevailing on date of shipment. Such prices are subject to addition of any and all excise, sales, or manufacturer's tax levied by lawful authority on the merchandise purchased under this contract.

The corresponding provision in the White contract was in all material respects identical[1] and it was found (Apdx. 4a) that in fact the prices charged the two customers on sales subsequent to the written contracts continued to be identical for the same kind, quality and size of tires and tubes (Apdx. 5a).

The trial judge also found that for the fiscal year ending October 31, 1957, there was established and

---

[1] The corresponding provision in the White contract read as follows:

> "5. Prices. Supplier will invoice Buyer and approved distributors for White brand casings and tubes purchased hereunder at prices prevailing on date of shipment. Such prices are subject to addition of any and all excise, sales or manufacturer's tax levied by lawful authority on the merchandise purchased under this agreement."

in effect, as a part of the pricing policy of the chain store division, a yearly volume rebate program. This program was identical in its provisions for both Cordovan Associates and White Stores, Inc. (Apdx. 5a). In practice, the volume rebate program accorded somewhat more favorable prices to the Cordovan distributors than to White Stores and, on February 1, 1958, Dayton proposed that for the fiscal year ending October 31, 1958, it would set up a volume rebate program based on the result of the combined purchases of White Stores and Cordovan distributors for such fiscal year. This was designated as a super-bonus program and was accepted by both Cordovan and White on February 2, 1958 (Apdx. 6a). The trial judge held that by initiation of a super-bonus program, Dayton made a concession to Cordovan and White in the prices charged, which concession was within the terms of the contract providing for "prices prevailing on date of shipment" (Apdx. 6a).

In his comments, the trial judge observed that Cordovan and White had been customers of the chain store division of Dayton for a long period of time and that, throughout the dealings, there was always an effort on the part of each to obtain more favorable prices. (Apdx. 10a).

On June 12, 1958, Dayton, responding to market pressures (Apdx. 7a), presented a new plan of pricing to White which was called "based on cost" prices, as distinguished from the old plan of so-called "cost justification" (Apdx. 7a). The new plan of pricing was made retroactive to June 1, 1958. The trial judge found this new plan was an entirely different method of pricing and was not included in paragraph 5 of the contracts calling for "prices prevailing on date of shipment". The new plan afforded White prices

approximately 10% lower than the prices accorded under the old formula.

The trial judge further found that throughout the months of April, May and June of 1958, negotiations also took place between Cordovan and Dayton with respect to a new or amended contract to take the place of the contract, the construction of which was in issue (Apdx. 6a-7a). He found that the purpose of these negotiations on the part of Cordovan was to obtain more favorable prices, a "cost plus" basis of pricing and a different method of operation (Apdx. 7a). These negotiations proved abortive and no new contract eventuated, though on June 26, 1958, Dayton offered Cordovan Associates a new contract with the same pricing plan which had been given to White Stores. Certain conditions in the new contract were refused by Cordovan, and, accordingly, until the expiration of its contract on October 31, 1958, charges were made to Cordovan under the "prevailing price clause" and these charges the trial judge concluded were proper.

On review, the Court of Appeals observed that basicly Cordovan contended "that all parties understood the prices were to be the same to each of the two large chain store customers." The court held that the decisive question was whether or not this contention was correct. It then observed that the trial judge had stated in his findings that "[t]here was no provision, either oral or written, nor were there facts from which an inference could be drawn that Cordovan prices were to be tied to White prices under all circumstances." The Court of Appeals said this was actually an inference or conclusion from the facts with which it was free to disagree, uninhibited by the clearly erroneous test of Rule 52 of the Federal Rules of Civil Procedure. The Court did disagree and disagreeing reversed the judgment of the District Court.

In noting its disagreement the Court of Appeals referred to the "manifest meaning of the language used," to the "uniform pricing policy" of Dayton and to the practical interpretation placed on the contract by the parties (Apdx. 15a-16a). In these areas it disagreed with the District Court and thus found, contrary to the District Court, that all parties understood that the prices were to be the same to each of the two large chain store customers under all circumstances (Apdx. 15a, 17a). Consequently, it decided that the more favorable prices negotiated by White inured to the benefit of Cordovan distributors. The court did not comment upon the fact that the trial court had found, in effect, that "prices prevailing on date of shipment" had reference to a pricing formula, the so-called (cost justification formula); it did not comment upon the fact that the White contract was entered into before the Cordovan contract and was for a term of three years rather than the two year term of the Cordovan contract. Nor, did the court refer or comment upon the fact found by the trial court that Cordovan, like White, had tried to obtain a different cost basis though Cordovan sought "cost plus" prices at the time that White agreed to accept prices "based on cost." These factors were not alluded to by the Court of Appeals even though it disagreed with the District Court and reversed its judgment.

REASONS FOR GRANTING THE WRIT

(1) This case emphasizes the conflict that exists between the circuits as to the application of the clearly erroneous test of Rule 52. On the one hand, there is a line of authority holding that inferences and conclusions drawn by the trial judge are not to be rejected by a reviewing court unless clearly erroneous. These

cases frequently cite and rely upon the decision of this Court in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 394. On the other hand, there is a line of authority that holds that findings which embody inferences and conclusions can be set aside when the reviewing court disagrees with the position of the trial court. These authorities either ignore or seek to distinguish the holding of this court in *United States* v. *U. S. Gypsum Co., supra.*

In *Texas Co. v. R. O'Brien & Co.*, 242 F. 2d 526, the Court of Appeals for the First Circuit observed that there is a singular lack of unanimity not only between but within individual circuits with regard to the right of a reviewing court to disregard what it termed ultimate findings, when based upon written or undisputed evidence and the court collected some of the more recent examples[2] of such disagreement.

---

[2] The court notes the following recent examples of conflict:

Court free to disregard ultimate findings when based upon written or undisputed evidence: *Kraft Foods Co.* v. *Commissioner of Internal Revenue*, 2 Cir., 1956, 232 F. 2d 118; *United States* v. *One 1950 Buick Sedan*, 3 Cir., 1956, 231 F. 2d 219 (court reaches result by indicating an ultimate "inference" is not a "finding of fact."); *Seagrave Corp.* v. *Mount*, 6 Cir., 1954, 212 F. 2d 389; *Chicago, Burlington & Quincy R. Co.* v. *United States*, 7 Cir., 1955, 221 F. 2d 811; *Stevenot* v. *Norberg*, 9 Cir., 1954, 210 F. 2d 615.

Court cannot reverse such findings merely because it disagrees with them, but must conclude they are "clearly erroneous"; *Central Ry. Signal Co.* v. *Longden*, 7 Cir., 1952, 194 F. 2d 310; *Coleman* v. *Sears, Roebuck & Co.*, 8 Cir., 1956, 238 F. 2d 206; *Hycon Manufacturing Co.* v. *H. Koch & Sons*, 9 Cir., 1955, 219 F. 2d 353, certiorari denied, 1955, 349 U.S. 953, 75 S. Ct. 881, 99 L. Ed. 1278; *Kaye* v. *Smitherman*, 10 Cir., 1955, 225 F. 2d 583, certiorari denied, 1955, 350 U.S. 912, 76 S. Ct. 197, 100 L. Ed. 800; *Bishop* v. *United States*, 1955, 96 U.S. App. D.C. 117, 223 F. 2d 582, judgment vacated and remanded, 1956, 350 U.S. 961, 76 S. Ct. 440, 100 L. Ed. 835 semble.

The seriousness of the disagreement that exists between the circuits is reflected in the two different lines of authority that have developed within the Sixth Circuit. In the instant case the court singled out a particular finding which it held embodied an inference or conclusion, and so holding felt free to disagree uninhibited by the clearly erroneous test of Rule 52. It could support its position by citing authorities both from within the Sixth Circuit and from other circuits. Nevertheless, the position taken is in sharp contrast to the holding of a different panel of the same court in *Wright* v. *C.I.R.*, 274 F. 2d 883, 884 (decided February 20, 1960), where the court did apply the clearly erroneous test to the inferences and conclusions of the trial judge. In that case the court said—

> We consider the inferences and conclusions of the trial judge to be logical and reasonable and not clearly erroneous. Rule 52(a) F.R.Civ.P., 28 U.S.C.A. being applicable, the decision of the Tax Court will not be disturbed. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; *McAllister* v. *United States*, 348 U.S. 19, 20, 76 S. Ct. 6, 99 L. Ed. 20; *Central Ry. Signal Co.* v. *Longden*, 7 Cir., 194 F. 2d 310, 318; *Wise* v. *C.I.R.*, 6 Cir., 260 F. 2d 354.

It will be observed that the court in that case was relying upon the decision of this court in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364; and *McAllister* v. *United States*, 348 U.S. 19, 20. It also relied upon a decision in another circuit as well as a prior decision of the Sixth Circuit. The fact is that in several recent opinions, *Willett* v. *C.I.R.*, 277 F. 2d 586 (C. A. 6, 1960); *C.I.R.* v. *Consolidated Iron Ores Limited*, 265 F. 2d 320 (C. A. 6, 1959); and, in *Yunker*

v. *Commissioner*, 256 F. 2d 130 (C. A. 6, 1958), the Court of Appeals for the Sixth Circuit has expressly referred to this conflict,[3] noting that it exists not only within the Circuit, but that there is a conflict between the circuits. In the recent *Willett* case, *supra*, the court said

> Counsel for the petitioners contend that the clearly erroneous rule is not applicable to conclusions drawn by the Trial Judge from undisputed facts.
>
> In *Commissioner of Internal Revenue* v. *Consolidated Premium Iron Ores, Limited, supra*, it was pointed out by this Court that not only is there a conflict in the Circuits on this point but there are also conflicts on it within the Circuits. This is true in the Sixth Circuit. (See cases cited in the *Consolidated Premium Iron Ores* case.) On this question we adhere to the view expressed in the *Consolidated Premium Iron Ores* case.

While this Court has in such cases as *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395; *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275-276; *McAllister* v. *United States*, 348 U.S. 19, 20; and, *Commissioner* v. *Duberstein*, — U.S. —

---

[3] The position taken by the court in this case as to the application of the clearly erroneous test is wholly inconsistent with the position taken in other recent cases in the same court. See *United States* v. *Allinger*, 275 F. 2d 421 (decided March 3, 1960); and, *Willett* v. *C.I.R.*, 277 F. 2d 586 (decided April 12, 1960); and is inconsistent with the holding in *C.I.R.* v. *Consolidated Premium Iron Ores Limited*, 265 F. 2d 856 (C. A. 6, 1959); *Dixie Sand & Gravel Corp.* v. *Holland*, 255 F. 2d 304 (C. A. 6, 1958); and *Rich* v. *Pappas*, 229 F. 2d 308 (C. A. 6, 1956). But views contrary to those expressed in the above cases are found in: *Gudgel* v. *C.I.R.*, 273 F. 2d 206 (C. A. 6, 1959); *Yunker* v. *Commissioner*, 256 F. 2d 130 (C. A. 6, 1958); *E. H. Sheldon and Co.* v. *C.I.R.*, 214 F. 2d 655 (C. A. 6, 1954); *Seagrave Corp.* v. *Mount*, 212 F. 2d 389 (C. A. 6, 1954); and, *Letcher County* v. *Defoe*, 151 F. 2d 987 (C. A. 6, 1945).

(decided June 13, 1960), considered and laid down guide posts as to the right of a reviewing court to reject the findings of a trial court, it nevertheless appears that the decisions of the several circuit courts are far from harmonious. It is clear from the conflicting decisions that the various circuit courts have divergent views as to the substance of this Court's prior decisions. The split in the authorities is manifest and is reflected in the conflicting decisions of individual circuits which produces a particularly undesirable situation because success or failure on review depends too often upon the fortuitous circumstance of the make-up of the panel that hears the case. The question is one which arises in many cases and, as a consequence, is obviously important. The guide posts which this Court has laid down, in this admittedly difficult area, are not sufficient as yet to bring harmony into the decisions and we believe, therefore, the Court might well consider the question raised as worthy of further consideration and elucidation.

(2) While the court below could, because of the conflicting decisions in the several circuits and within the circuit, find some authority for its position in this case, we submit that it is clear the court actually failed to follow the authoritative decisions of this Court when it simply noted its disagreement with the finding in question and did not subject it to the clearly erroneous test. The court below felt it was uninhibited by the clearly erroneous test because the finding in question was an "inference or conclusion", but it is clear from the authoritative decisions of this Court that to the extent this finding did involve inferences from basic facts it should have been subjected to the clearly erroneous test. See, *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395; *Commissioner* v. *Duberstein*, — U.S. — (decided June 13, 1960).

The court observed that what was essentially at issue was the understanding of the parties as to the meaning of the phrase "prices prevailing on date of shipment." That understanding was a question of fact which the trial court had the duty to resolve. This was not a case in which the facts, as such, were undisputed. There were two weeks of trial and numerous witnesses testified. In many areas the evidence was conflicting. This was particularly true with regard to the pricing policy of Dayton and the significance of the various facts which constituted the practical construction of the contract by the parties. The trial court distilled these disputed facts into findings, and in the course of those findings stated—

> "There was no provision, either oral or written, nor were there facts from which an inference could be drawn that Cordovan prices were to be tied to White prices under all circumstances.

The Court of Appeals disagreed with that finding, but did not say that it was left with a definite or firm conviction that the finding was erroneous; it did not say the finding was induced by an erroneous view of the law; or, that it was against the weight of the evidence. The appellate court simply disagreed. Its disagreement tends to gloss over the fact that what the court actually did on review was to fish in the troubled waters of conflicting inferences.

The Court of Appeals treated the case as one in which there was no dispute as to the evidentiary facts. It could do this, however, only in the sense that Cordovan, as appellant, accepted most of the findings of the trial judge. Those findings were in important respects the end product of sharply conflicting evidence. When the trial court declared that there were no facts from which it could draw an inference

that Cordovan prices were to be tied to White prices under all circumstances, it undoubtedly had in mind the conflicting evidence presented with respect to the pricing policy of Dayton and the meeting in February of 1958, at which the super bonus program was inaugurated. The trial court may also have had in mind that any conclusion that White and Cordovan prices were to be the same under all circumstances would run counter to the fact that the White contract and the Cordovan contract were entered into at different times and extended for different periods of time (Apdx. 4a). It might also have had in mind that any conclusion that White and Cordovan prices were to be the same under all circumstances would be at odds with the fact that both White and Cordovan separately and repeatedly negotiated for different base prices (Apdx. 10a).

The Court of Appeals, in reversing the judgment of the trial judge, purports to disagree only with a single finding. In reality, the disagreement was more profound because the court found in effect, contrary to the trial court, that it was the policy of Dayton to accord identical prices to both White and Cordovan "under all circumstances" and found the course of dealing of the parties demonstrated an understanding that White and Cordovan be accorded identical prices "under all circumstances." The Court of Appeals quite obviously looked at the policy of Dayton and the course of dealings of the parties differently than did the trial court, though the trial court heard and observed the witnesses who testified with respect to the policy and the course of dealings. While the court speaks of the finding in question as an inference, there must first be facts before there can be an inference and the determination as to whether or not

there were facts is itself a factual determination to which the clearly erroneous test should have been applied.

The decision of the Court of Appeals in this case was issued on June 6, 1960. Seven days later this Court rendered its opinion in *Commissioner* v. *Duberstein*, — U.S. —, (decided June 13, 1960), and reiterated its position as to the application of the clearly erroneous test and particularly its application to inferences. It said, in part—

> Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed Rules Civ Proc, 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 766, 68 S. Ct. 525. The rule itself applies also to factual inferences from undisputed basic facts, id 333 U.S. at 394, as will on many occasions be presented in this area. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 609, 610, 94 L. Ed. 1097, 1102, 1103, 70 S. Ct. 854. And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. IRC, § 7482(a).

In the present case it seems clear that the court below erred when it failed to apply the clearly erroneous test to the finding in question. We think that, regardless of the semantics involved, it is obvious that what the court below did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Under

the authoritative decisions of this Court this was clearly improper.

CONCLUSION

We believe that the error in the decision of the court below is manifest and that to the extent the court set aside inferences by the trial judge simply because it disagreed with them the decision is in conflict with principles established in the applicable decisions of this Court. It is suggested that the Court for that reason might deem it appropriate to grant the writ and reverse without further briefs or argument. We would also point out, however, that this case does signalize and emphasize the divergent views that have been, and now are, held with respect to the application of the clearly erroneous test. The views are so divergent that they are reflected in contradictory decisions within individual circuits, and since the principles involved are important in many cases it may well be that the Court would deem it appropriate to restate and make more explicit the considerations that are to guide reviewing courts with regard to the application of the clearly erroneous test of Rule 52.

Respectfully submitted,

PHILIP C. EBELING
PICKREL, SCHAEFFER AND EBELING
Third National Bank Building
Dayton, Ohio

and

JAMES E. CORKEY
Shoreham Building
Washington, D. C.

Attorneys for Petitioner

APPENDIX

APPENDIX A

Findings of Fact and Conclusions of Law

(Filed May 6, 1959.)

CECIL, District Judge:

This case was tried and submitted to the Court upon the pleadings, the evidence and oral arguments of counsel. Upon consideration whereof, the Court makes the following Findings of Fact:

1. Plaintiff, The Dayton Rubber Company, hereinafter for convenience referred to as "Dayton Rubber," is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and is a citizen of the State of Ohio.

2. Defendant, Cordovan Associates, Incorporated, hereinafter for convenience referred to as "Cordovan," is a corporation organized and existing under and by virtue of the laws of the State of Virginia, and is a citizen of the State of Virginia.

3. Cordovan is the owner, by conveyance and assignment from Automotive Associates, Inc., a corporation on or about March 1956, of the trade-mark "Cordovan" and the molds in which the "Cordovan" brand casings and tubes are manufactured.

4. Cordovan is engaged in the business of having manufactured for its associate members and approved distributors "Cordovan" brand casings and tubes for resale by such associates and approved distributors, who are Chain Store Operators of automotive retail businesses throughout a large area of the United States. Such associate members and approved distributors are hereafter, for convenience sake, referred to as "Cordovan Associates."

5. "Cordovan" brand casings and tubes have, since about 1947 and continuously since that date and throughout the term of the contract the subject of this action, been manufactured by Dayton Rubber for purchase and resale by automotive Chain Store businesses authorized to use the "Cordovan" brand by the owner of such mark and molds.

6. White Stores, Inc., hereafter, for convenience sake, referred to as "White," is a corporation with its principal office in Wichita Falls, Texas, and is now, and at all times since about 1947 has been, the owner of the trademark and name "White" as applied to casings and tubes, and the owner of the molds in which such casings and tubes were manufacturing for it by Dayton Rubber. White Stores, Inc., operates a Chain Store retail business in the automotive field in Texas and nearby States.

7. Prior to November 1, 1956, for several years, Dayton Rubber manufactured its own private brand casings under the trademark and name "Road King" for purchase for resale by chain store automotive businesses.

8. Since about 1947, Dayton Rubber has operated a division of its business under a division of its company generally known and described as its "Chain Store Division."

9. At all times since the organization of such Division, Dayton Rubber has conducted its operations in the manufacture and sale of "Cordovan," and "White," and "Road King" casings and tubes by and through its Chain Store Division, and purchasers of casings and tubes manufactured and sold by Dayton Rubber through its Chain Store Division consisted only of Cordovan Associates, White, and purchasers of the "Road King" brand.

10. Billing prices of casings and tubes manufactured and sold by Dayton Rubber through its Chain Store Division were established on what is known in the trade as a "Cost Justification" basis.

11. At all times prior to August 16, 1956, and continuously thereafter until June 1, 1958, the net billing prices of the Dayton Rubber for tires (casings) and tubes of the same quality, kind, and size sold by it through its Chain Store Division were identical as between all customers of the Chain Store Division of Dayton Rubber, including White and Cordovan Associates. The "net billing price," as herein used, sometimes referred to in the trade as "base billing price," means the gross billing price less "mold amortization" charge in the case of Cordovan, and "price equalization" charge for amortization of White molds in the case of White.

12. For several years prior to August 16, 1956, there was a pricing policy established and in effect in the Chain Store Division of Dayton Rubber, applicable alike to all customers of such Division, whereby identical base or net billing prices were established for all tires and tubes sold through such Division to all customers thereof, namely, Cordovan, White and Road King, and that Cordovan Associates and in particular representatives thereof constituting the Board of Directors of Cordovan, had been told of this uniform pricing policy, and that base or net billing prices for tires and tubes of the same kind, quality and size were identical as between all customers of such Division.

13. Prices as established by Dayton Rubber in its Chain Store Division fluctuated from time to time with industry conditions, but fluctuations so occurring were applied uniformly and identically as to all customers of such Chain Store Division. Prices, as established in the Chain Store Division, were revised from time to time, generally on a quarterly basis, and shipments made during any such quarterly period were at the prices as established and then in effect for such quarterly period. This policy was known to Cordovan Associates, White, and customers of the Road King brand, being all of the customers of the Chain Store

Division throughout the time of their respective purchasing from such Chain Store Division.

14. Prior to August 1, 1956, there were no written contracts between Dayton Rubber, Cordovan, Cordovan Associates, or White.

15. In the Summer of 1956, prior to August 1, 1956, Dayton Rubber concluded to abandon its efforts to promote sales of its own Road King brand through its Chain Store Division, and to promote its sales to chain stores through expansion of Cordovan Associates and White retail sales outlets. In adopting this policy, Dayton Rubber desired to assure itself for a proposed period of at least three years of the purchase from Dayton Rubber of all of the tire and tube requirements of all Cordovan Associates and White, and proposed to such a written contract accordingly.

16. Such written contracts, as prepared by Dayton Rubber and so proposed to Cordovan and White, were duly executed and delivered between Dayton Rubber and White (Exhibit No. D) for a term of three years commencing August 1, 1956, and between Dayton Rubber and Cordovan (Exhibit No. 1) for a term of two years commencing November 1, 1956, Cordovan at that time being unwilling to enter into such proposed contract for a term of more than two years.

17. The contract with White contained the following paragraph as to prices to be charged for tires and tubes purchased from Dayton Rubber under such contract:

> "5. Prices. Supplier will invoice Buyer and approved distributors for White brand casings and tubes purchased hereunder at prices prevailing on date of shipment. Such prices are subject to addition of any and all excise, sales, or manufacturer's tax levied by lawful authority on the merchandise purchased under this agreement."

The contract with Cordovan contained the following paragraph with regard to prices for tires and tubes purchased under such contract.

> "5. Prices. Supplier with invoice buyers associates and approved distributors for Cordovan brand casings and tubes purchased hereunder at prices prevailing on date of shipment. Such prices are subject to addition of any and all excise, sales, or manufacturer's tax levied by lawful authority on the merchandise under this agreement."

In each contract, the prices at which the tires and tubes to be purchased thereunder were defined as "prices prevailing on date of shipment."

18. At all times from and after the effective date of such contract, November 1, 1956, and until at least June 1, 1958, net billing prices as stipulated in evidence between the parties hereto were identical as between Cordovan Associates and White for the same kind, quality and size of tires and tubes.

19. That for the fiscal year ended October 31, 1957, there was established and in effect, as a part of the pricing policy of the Chain Store Division, a volume rebate program on a graduate scale of percentage rebate on volume of purchases for such fiscal year identical in its provisions with both Cordovan Associates and White, but that the net result of this volume rebate policy was to create a difference in volume purchase percentage rebate to Cordovan as compared to White, because of the different aggregate volume of annual purchases of these two groups for such fiscal year. The purpose of such bonus program was to create an incentive for Cordovan Associates and White to increase their resales of Dayton Rubber products, and the plan in effect as to both was identical.

20. For the purpose of creating a greater sales incentive for the future to Cordovan Associates and White, and

establishing a joint bonus and super-bonus program, based on combining the sales of both for computation of such volume rebates, Dayton Rubber invited the members of the Board of Directors and officers of Cordovan and the President of White to a joint meeting at the Ambassador East Hotel, in Chicago, on the evening of February 1, 1958, and at this meeting Dayton Rubber, through its representatives, proposed that for the fiscal year ended October 31, 1958, Dayton Rubber would set up a volume rebate program based on the result of the combined purchases of White and Cordovan Associates for such fiscal year on a graduate scale of percentage rebate on such combined purchases up to a maximum of 7½%, which Dayton Rubber designated as a "super-bonus program," and that, anticipating such combined sales volume would reasonably exceed a minimum of 5% of such fiscal year, credit memos would be issued to each purchaser with respect to all purchases of tires and tubes made after November 1, 1957, to February 28, 1958, and thereafter for the remainder of such fiscal year such 5% credit would be applicable to all further purchases during the remainder of the fiscal year, and final credit memo issued at the end of such fiscal year.

21. The above proposal by Dayton Rubber was accepted by both Cordovan and White February 2, 1958, credit memos pursuant thereto were duly issued, and base or net billing prices continued and remained identical as between Cordovan Associates and White until June 1, 1958.

22. At the Chicago meeting the Dayton Rubber made a concession to Cordovan and White in the prices charged which concession was within the terms of "prices prevailing on date of shipment." There were no modifications of, or amendments or supplements to the contracts between Dayton Rubber and Cordovan and Dayton Rubber and White.

23. After April 1, 1958, and throughout the months of April, May and June of that year, negotiations took place

between Cordovan and Dayton Rubber with respect to a new or amended contract to take the place of the contract, the construction of which is the issue before this Court, but such negotiations failed to result in any new or amended contract, and the contract submitted to this Court for construction remained in full force and effect until October 31, 1958, without change. The purpose of the negotiations was to get more favorable prices—a cost-plus basis of pricing and a different method of operation.

24. Near the end of April, 1958, Cordovan notified Dayton Rubber that it would terminate the contract as of October 31, 1958. Toward the end of the year 1957, White advised Dayton Rubber that U. S. Rubber Co., had quoted it better prices than Dayton Rubber was giving.

25. Dayton Rubber was concerned about the possible loss of the Cordovan business and was interested in obtaining a new contract with it. Dayton Rubber was also concerned with retaining the business of White and was under threat of White to buy of other manufacturers at lower prices.

26. On June 12, 1958, Mr. Goodenberger made a trip to Texas to see representatives of White. At this time as a result of White's complaints about the prices of "White" brand casings and tubes being too high, and White's threat to buy casings and tubes elsewhere at lower prices, Dayton Rubber presented to White a new plan of pricing. This new plan was called a "based on cost price" as distinguished from the old plan which was called "cost justification." Under the new plan the bonus and super bonus rebates were abandoned. The new plan of pricing was accepted by White and became effective retroactively to June 1, 1958. This new plan was an entirely different method of pricing and was not included under paragraph 5 of the contracts, "Prices prevailing on date of shipment." This method of pricing was abandoned. This new plan provided for about a 10% lower cost to White.

27. On June 26, 1958, Dayton Rubber offered a new contract to Cordovan to replace the old contract expiring on October 31, 1958, and to be effective as of July 1, 1958. This offer provided for the same method of pricing as was given to White and the prices were identical with those of the new White Plan. There were conditions attached to the offer which were unacceptable to Cordovan and no new agreement was made.

28. There was no provision, either oral or written, nor were there facts from which an inference could be drawn that Cordovan prices were to be tied to White prices under all circumstances.

29. From and after June 1, 1958, Dayton Rubber continued to invoice Cordovan Associates at prices "prevailing on date of shipment" which were higher than prices made effective June 1, 1958 as to White purchases from its Chain Store Division.

CONCLUSIONS OF LAW AND FACT

1. The Court has jurisdiction over The Dayton Rubber Company, plaintiff, herein, and defendant, Cordovan Associates, Incorporated the parties herein and the subject matter of this action.

2. The sole issue before this Court is the construction of the contract and in particular Paragraph 5 thereof, entered into between plaintiff and defendant herein under date of November 1, 1956, a copy of which contract is in evidence, marked "Exhibit 1."

3. Such contract was duly executed and delivered between the parties hereto and is a valid and enforcible contract for the specified term thereof, to-wit: November 1, 1956 to October 31, 1958.

4. Paragraph 5 of the contract between Dayton Rubber and Cordovan does not in and of itself specify any particu-

lar schedule of prices that can be determined without reference to sources outside of the document.

The phrase "at prices prevailing on date of shipment" as used in the contract, contemplates a schedule of prices to be fixed by the seller. These prices cannot be arbitrarily fixed, but must be such as will enable the manufacturer, (seller) to compete with other manufacturers for the business of the buyer (Cordovan) and such as will enable the buyer to compete with other dealers for the business of the buying public, that is, the customer.

Since the contract between Dayton Rubber and White had the same paragraph 5 as the Cordovan contract and used the term "prevailing prices" in the same way, it must be construed that White prices and Cordovan prices would be the same.

5. The Court concludes, that the prices would be the same for the reason that the provisions of the contracts are the same, both units were customers of the Chain Store Division and the only brand customers of that Division and the volume of business of the two units were substantially the same. Things that are equal to the same things are equal to each other.

6. Finally, the Court draws inferences and conclusions from the facts found that the pricing schedule at which White was billed after June 1, 1958, constituted a new method of pricing and was not included within the term "at prices prevailing on date of shipment";

That this new plan of pricing was adopted in order to hold the business of White and to obtain a new contract with Cordovan.

That Cordovan did not accept the new plan with the conditions attached;

And that it was, therefore, bound by its contract to pay "at prices prevailing on date of shipment" until its contract expired on October 31, 1958.

Wherever in these Findings and Conclusions a statement is a mixed Finding of Fact and Conclusion of Fact, it may be considered as either or both.

COMMENT

Cordovan and White had been customers of the Chain Store Division of Dayton Rubber for a long period of time. Their dealings antedated by several years, the contracts which are involved in this case. Throughout these dealings, there was always an effort on the part of the customers to obtain more favorable prices. In the Fall of 1957, this apparently had reached a point where Dayton Rubber considered that it was necessary to make some concessions.

At a meeting in Chicago on February 1, 1958, Mr. Eisbrouch, at that time of Dayton Rubber, offered to representatives of Cordovan and Mr. White a plan whereby a rebate, called a "super bonus" was to be figured on the combined purchases of both White and Cordovan. This was a considerable concession and eased the tension for a while.

On April 1, 1958, Mr. Eisbrouch, who had left Dayton Rubber, became the executive head of Cordovan. He immediately began negotiating with Dayton Rubber for a different price formula. It was the feeling of representatives of Cordovan that it had reached maturity, so to speak, and was buying in sufficient quantities that it should be entitled to a price formula known as "cost-plus." To strengthen its demands and bargaining position, Cordovan, toward the end of April, 1958, gave Dayton Rubber the six months' notice required by the contract that it would terminate its contract on October 31, 1958. Mr. Eisbrouch was negotiating for a new pricing agreement on a cost-plus basis for Cordovan. He was not concerned about lower prices for White.

In the meantime, White was restless. As Mr. White indicated in his deposition, he was of the opinion that he

was not bound by the contract if he could obtain better prices elsewhere. In the face of losing this substantial block of business, Dayton Rubber was forced to try to adopt some plan that would salvage the business of these two customers.

Accordingly, it worked out a new pricing plan known as "based on cost" prices. By this plan rebates were abandoned and net prices were about 10% lower than they had been under the old plan. Mr. Goodenberg offered this new pricing plan to White and it was accepted. White continued its business with Dayton Rubber. Thereafter, Dayton Rubber offered the plan to Cordovan, with some conditions attached. The purpose of Dayton Rubber offering this plan to Cordovan was to get a new contract. Dayton Rubber considered that it could not offer the plan without the conditions and Cordovan considered that it could not accept the plan with the conditions. Therefore, no agreement was reached and Dayton Rubber lost the business with the expiration of the contract.

It seems absurd that Dayton Rubber would be bound to reduce Cordovan's prices by 10% and still not get any contract. Certainly, it cannot claim the benefit of prices which were given to White in order to retain its business and with which Dayton Rubber did hold the White business.

(Signed) Lester L. Cecil
Judge, United States
District Court, S.D.O.

APPENDIX B

Order of Declaratory Judgment

(Filed June 8, 1959.)

This case came on for hearing upon Plaintiff's Complaint for a Declaratory Judgment, the Defendant's Amended Answer, the oral evidence, stipulations of counsel, exhibits, proposed findings of fact and conclusions of law, oral arguments and briefs of counsel.

Upon consideration whereof the Court finds the facts to be as stated in findings of facts filed on May 6, 1959, which are incorporated herein and made a part hereof.

That the Court has jurisdiction over the Dayton Rubber Company, the plaintiff herein and Cordovan Associates, Incorporated, the defendant herein, and the subject matter of this action, between Dayton Rubber Company and Cordovan Associates, Incorporated.

That a certain contract entered into between plaintiff and defendant herein under date of November 1, 1956, a copy of which contract is in evidence marked "Exhibit 1" was duly executed and delivered between the parties hereto and is a valid and enforcible contract for the specified term thereof, to-wit, November 1, 1956 to October 31, 1958.

That the correct prices are determined under Paragraph 5 of the contract to be those prices established at the time of shipment by the plaintiff for merchandise sold by the plaintiff to the defendant's associates and approved distributors during the term of the contract.

And that all of the conclusions of law and fact as stated in the Court's conclusions dated May 6, 1959 are incorporated herein and made a part hereof.

Costs of $21.40 paid.

/s/ Lester L. Cecil
Judge, U. S. District Court,
SDO.

APPENDIX C

Opinion of the United States Court of Appeals For the Sixth Circuit

Before MARTIN, WEICK, and O'SULLIVAN, Circuit Judges.

Martin Circuit Judge. The Dayton Rubber Company, a manufacturer of automobile tires and tubes, brought this action for a declaratory judgment, interpreting the pricing clause of a contract between that company and Cordovan Associates, Incorporated, one of the two automobile retail chain sfores to which its manufactured tires and tubes were sold. The contract prices to be paid for tires, purchased by Cordovan Associates from Dayton Rubber Company, were to be "prices prevailing on date of shipment." A separate contract with White Stores, Inc., the other automotive retail chain store to which Dayton Rubber Company sold its tires, contained an identical pricing clause.

The defendant-appellant, Cordovan Associates, Incorporated, appeals to this court from an adverse Declaratory Judgment entered by the trial judge, who found the prices charged by the rubber company to be lawful under its contract with appellant. This judgment was in consonance with the Findings of Fact, the "Conclusions of Law and Fact" and the "Comment" made by the trial judge after a non-jury trial of two weeks' duration.

From 1947 to 1956, Dayton Rubber Company, through its chain-store division, had sold tires to both White Stores and Cordovan Associates, billing them on an identical "cost justification" basis without written contract with either customer. Fluctuations in prices, which generally came about quarterly, were applied uniformly and identically to shipments going to both customers. In 1956, the appellee company executed separate contracts with White Stores and Cordovan Associates for stated terms of three and two years, respectively. The two contracts contained the same pricing clause: "prices prevailing on date of shipment." The prices charged the two customers on

sales subsequent to the contracts continued to be identical for the same kind, quality and size of tires and tubes.

This equal-treatment policy continued after separte, but identical, supplemental agreements between Dayton Rubber Company and Cordovan Associates, Incorporated, and between Dayton Rubber Company and White Stores, Inc., had been entered into on February 2, 1958. In these supplemental agreements, the rubber company gave each of its two chain store customers a scale of rebates, graduated according to the combined volume of tires purchased, up to a maximum of seven-and-one-half percent of the purchase price. This concession to the two customers was made in order to instill greater buying initiative; and prices to each chain-store customer continued to be computed identically thereunder until June of 1958. The concession, or modification, was within the terms of the "prices prevailing on date of shipment" provision included in each of the contracts.

Although the contract between Dayton Rubber Company and White Stores, Inc., had more than a year to run, the appellee rubber company on June 12, 1958, gave White Stores a new pricing plan, "based on cost price." This was done in order to retain the customer's business; and the plan was made retroactively effective to June 1, 1958. This cost-price plan proved to be ten percent lower to White Stores than was the old "cost justification" formula; and it was found to be "an entirely different method of pricing and was not included under paragraph 5 of the contracts."

On June 26, 1958, the appellant, Cordovan Associates, Incorporated, was offered a new contract with the same new pricing plan which had been given to White Stores. Certain conditions therein were refused by the appellant. So, until the expiration of its contract on October 31, 1958, charges were made to the Cordovan company under the "prevailing price" clause. These charges were ten percent higher than those which White Stores was required to

pay during the same period. It is the contention of appellant that the "prevailing prices" clause in its contract with Dayton Rubber Company entitled it to the same prices given by appellee to White Stores under an identical pricing clause in the contract between the rubber company and White Stores; and that all parties understood the prices were to be the same to each of the two large chain-store customers.

Whether or not this contention is correct is the decisive question to be answered on this review. *Chandler* v. *United States*, 226 F. (2d) 403, 405 (C. A. 7). Although the able trial judge stated in his findings of fact that "there was no provision, either oral or written, nor were there facts from which an inference could be drawn, that Cordovan prices were to be tied to White prices under all circumstances," this is actually an inference or conclusion drawn from the facts with which an appellate court, uninhibited by the "clearly erroneous" test of Rule 52, Federal Rules of Civil Procedure [28 U. S. C. A., following 723 (c)], is free to disagree.

In the case at bar, as in *Letcher County* v. *DeFoe*, 151 F. (2nd) 987, 990, (C. A. 6), there was "no factual controversy and no challenge to the evidentiary findings of the court." In such a situation, an appellate court, "remains free to draw the ultimate inferences and conclusions which evidentiary writings reasonably induce." See also *Wallnig* v. *N. C. & St. L. Ry.*, 155 F. (2d) 1016 (C. A. 6); *Harris Stanley Coal & Land Co.* v. *C. & O. Ry. Co.*, 154 F. (2d) 450 (C. A. 6).

Considering the language used in the pricing clause of the contract—"prices prevailing on date of shipment" —we think it necessary, if possible, to enforce the instrument according to the manifest meaning of the language used. The term "prevailing prices" would seem to mean prices, which, at any particular time, are charged by a seller for a certain product. We think it would be illogical to hold that a seller may charge one of its two cus-

tomers a lower price than the other for the same item, when both have contracts to receive goods at "prevailing prices." There can be only one "prevailing price" at a given time; and, in the present context, it would fairly mean the lowest price for the commodity which the seller gives to either of his two large buyers in conformity with a contract provision for sales at "prevailing prices."

Throughout their course of dealing, it had been the uniform pricing policy of Dayton Rubber Company to bill its two chain store customers at identical base, or net, billing prices for tires furnished. The prices fluctuated from time to time, but the fluctuations were applied "uniformly and identically as to all customers." The Board of Directors of Cordovan Associates was told of this pricing policy; and this was the system which the parties followed without deviation. Thus, in departing from this system by giving White Stores a lower price, for whatever reason, and correspondingly refusing to lower the price to Cordovan Associates, except under certain conditions, the appellee company was no longer selling to appellant at the "prevailing price" called for in the contract between them.

Even if the meaning of "prevailing prices" is not disclosed by the actions of the parties up to the time the contract between Dayton Rubber Company and Cordovan Assoicates was signed, their own practical interpretation of the pricing clause in performing the contract would carry great weight—if indeed it did not control—in its interpretation. This has been the settled rule both in this circuit and in the State of Ohio. *Federal Surety Co.* v. *Bentley & Sons Co.*, 51 F. (2d) 24 (C. A. 6). See also *Cincinnati* v. *Gas Light & Coke Co.*, 53 Ohio St. 278, where the Ohio Supreme Court held that a contract to furnish gas at the "lowest average price at which gas shall or may be furnished to private individuals in the cities of New Orleans, Baltimore, New York, Louisville and Pittsburgh," was sufficiently clear and unambiguous to be interpreted by the court. The court added that, in case of doubt, the prac-

tical interpretation which had been placed on the contract by the parties over a long period of time should be adopted as the proper one. It was stated, however, that "to have any value as a practical construction, the course of dealing should be uniform, unquestioned and fully concurred in by both parties." Such was certainly the situation with respect to Dayton Rubber Company and Cordovan Associates, Incorporated.

For the foregoing reasons, the Declaratory Judgment entered in the United States District Court is reversed. The case is remanded for entry of judgment in accordance with this opinion.

APPENDIX D

Judgment

June 6, 1960

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the Declaratory Judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for entry of judgment in accordance with the opinion herein.